



(Billing Code 5001-06-P)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212 and 252**

**RIN 0750-AH27**

**Defense Federal Acquisition Regulation Supplement; Pilot Program  
for Acquisition of Military-Purpose Nondevelopmental Items  
(DFARS Case 2011-D034)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement establishing a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with streamlined procedures.

**DATES:** Effective date: [Insert date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Manuel Quinones, telephone 703-602-8383.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

To implement section 866 of the National Defense

Authorization Act for Fiscal Year 2011, DoD published an interim rule in the Federal Register at 76 FR 38048 on June 29, 2011, establishing a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with streamlined procedures. The authority for this pilot program expires on January 6, 2016. Under this pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of—

- Enabling DoD to acquire items that otherwise might not have been available to DoD;

- Assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and

- Protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired.

This pilot program is designed to test whether the streamlined procedures, similar to those available for commercial items, can serve as an effective incentive for nontraditional defense contractors to (1) channel investment and innovation into areas that are useful to DoD and (2) provide items developed exclusively at private expense to meet validated military requirements.

## **II. Discussion and Analysis of the Public Comments**

DoD reviewed the public comments received from three respondents in the development of the final rule. Two of the

three respondents are supportive of both the congressional intent and the interim rule. The respondents submitted comments covering the following three categories: (A) definition of nontraditional defense contractor; (B) definition of military-purpose nondevelopmental item; and (C) flow down of provision to subcontractors. A discussion of the comments and responses are provided as follows.

**A. Definition of nontraditional defense contractor.**

Two of the three respondents recommended revisions to the definition of nontraditional defense contractor.

Comment: One respondent suggested expanding the definition of a nontraditional defense contractor to mean an entity to include a business unit, segment or wholly-owned subsidiary of an entity. The respondent asserted that such clarifying language would permit a commercial company that occasionally accepts a contract with certified cost or pricing data requirements to participate in the pilot program without being burdened by what are recognized to be onerous contractual requirements.

Response: With regard to expanding the meaning of an entity to include "a business unit, segment or wholly-owned subsidiary of an entity," the entity referred to in the interim rule is, in essence, the legal entity that signs the contract with the Government. This entity must meet all of the statutory requirements included in the definition for a nontraditional

defense contractor contained in the contract clause, and changing the definition as requested would not be consistent with that definition. Therefore, no changes have been made to the final rule as a result of the comment.

Comment: Another respondent stated that the definitions are not clear as to whether Congress intended to allow subcontractors of prime contractors to be considered nontraditional defense contractors for purposes of the rule. The respondent asked, in situations where the prime contractor does not meet the definition of a nontraditional defense contractor, whether each of the subcontractors to the prime contractor will fail to meet the definition as well due to the definition of nontraditional defense contractor applying to contracts or subcontracts.

Response: The statutory definition of a nontraditional defense contractor (10 U.S.C. sec 2302) outlines the criteria that must be met by a prospective contractor to be eligible for the pilot program, which only covers award to prime contractors. One criterion states the entity may not be currently performing or has not performed "any contract or subcontracts" for DOD that is subject to full coverage under cost accounting standards. Entities that have performed as subcontractors to traditional defense contractors are not necessarily excluded from participating as a prime contractor under this pilot so long as the subcontract requirements did not entail the disqualifying

criteria (i.e., full CAS coverage and certified cost and pricing data) and the entity otherwise meets the criteria. No changes have been made to the final rule as a result of this comment.

**B. Definition of military-purpose nondevelopmental item.**

Comment: A respondent recommended amending the definition of the term "military-purpose nondevelopmental item" by revising the definitional criteria for determining whether an item meets the definition, including the extent to which independent research and development (IR&D) costs, and bid and proposal (B&P) costs, are considered in such a determination. The respondent cited section 824(b)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011, Pub. L. No. 111-383, as the basis for the recommended change.

Response: The interim rule uses the statutory definition of the term "military purpose nondevelopmental item" required by section 866 of the NDAA for FY 2011 and used only for purposes of this pilot program. The substantive revisions to the definition as proposed by the respondent would result in the Defense Federal Acquisition Regulation Supplement (DFARS) definition being noncompliant with the statutory definition and the criteria for applying the specialized procedures authorized for this pilot program. It is also important to note that the requirements for treatment of IR&D and B&P costs that are established by section 824 of the NDAA for FY2011 are being

addressed through DFARS Case 2011-D022. No changes have been made to the final rule as a result of this comment.

**C. Flow down of provision to subcontractors.**

Comment: A respondent stated that the interim rule (published as DFARS subpart 212.71) fails to clearly address the common situation in which a nontraditional defense contractor may simultaneously be a subcontractor or supplier to a traditional defense contractor. The respondent recommended the new DFARS rule make clear that it may and should flow down through any prime contract, to the suppliers/subcontractors.

Response: Unlike certain clauses, provisions are not flowed down to subcontractors. Solicitation provisions are to be completed and submitted by the prospective prime contractor with its offer. Furthermore, it is irrelevant to the program if a nontraditional defense contractor is simultaneously a subcontractor or supplier to a traditional defense contractor. As previously stated, section 866 only covers award to a prime contractor. No changes have been made to the final rule as a result of this comment.

**III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Regulatory Flexibility Act**

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 604, and is summarized as follows:

This rule implements a statutory requirement under section 866 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011. Section 866 authorized the Secretary of Defense to establish a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items.

The objective of this new DoD program is to permit DoD to enter into contracts with nontraditional defense contractors for the purpose of (1) enabling DoD to acquire items that otherwise might not have been available to DoD; (2) assisting DoD in the rapid acquisition and fielding of capabilities needed to meet

urgent operational needs; and (3) protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired.

No public comments were received in response to the initial regulatory flexibility analysis. The Chief Counsel for Advocacy of the Small Business Administration did not file any comments in response to this rule.

DoD is unable to estimate at this time the number of small entities impacted by the rule, since this is a new pilot program and its purpose is to identify and attract nontraditional defense contractors as defined within the rule and section 866 of the National Defense Authorization Act for Fiscal Year 2011.

There are no reporting, recordkeeping, or other compliance requirements to small entities associated with this rule. Additionally, there were no significant alternatives considered that met the stated objectives of the applicable statute.

## **V. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## **List of Subjects in 48 CFR Parts 212 and 252**

Government procurement.



**Mary Overstreet**

Editor, Defense Acquisition Regulations System.

**Interim Rule Adopted as Final Without Change**

Accordingly, the interim rule amending 48 CFR parts 212 and 252, which was published at 76 FR 38048 on June 29, 2011, is adopted as a final rule without change.

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